

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent application of :
Christopher M. Rowden : Group Art Unit 2671
Application No. 09/654,571 : Examiner Cliff N. Vo
Filed 1 September 2000 :
METHOD AND SYSTEM OF PRODUCING A LANDSCAPE PLAN

APPEAL BRIEF

U.S. Patent and Trademark Office
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Crystal Plaza Two, Lobby, Room 1B03
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Sir:

In response to the Office Action dated 26 November 2007, twice rejecting pending claim 12, and in support of the Notice of Appeal filed on 26 March 2008, Applicants hereby submit this Appeal Brief.

Real Parties in Interest

Christopher M. Rowden is the inventor and owns all of the rights in the above-identified U.S. patent application.

Related Appeals and Interferences

There are no other appeals or interferences related to this application or to any related application, nor will the disposition of this case affect, or be affected by, any other application directly or indirectly.

Status of Claims

Claims 1-16 and 18-21 are pending.

Claims 1-8 and 20 are withdrawn by the Examiner

Claim 17 is canceled.

Accordingly, the claims on appeal are 9-16, 18-19 and 21.

Status of Amendments

There are no pending amendments with respect to this application.

Summary of Claimed Subject Matter

The present invention is directed to a process for producing a landscape plan for a property.

As broadly recited in claim 9, a process for producing a landscape plan for a property comprises: defining a set of generic plant categories according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen (FIG. 1 – 110; page 5, line 16 – page 6, line 20); assigning a symbol to each generic plant category (FIG. 1 – 120; see also FIG. 4; page 6, line 21 – page 7, line 11); determining locations for plants to be placed on the property with reference to least one image of the property and a survey of the property (page 10, lines 19-20); and producing the landscape plan by indicating via the symbols locations for plants on the property (FIG. 1 – 150; see also FIG. 3; page 10, line 20 – page 11, line 9).

As broadly recited in claim 10, the generic plant categories are defined according to at least one of a plant height and a plant width (page 5, line 18; Table 1).

As broadly recited in claim 11, the generic plant categories are defined according to a leaf texture (page 5, line 18 – page 6, line 1; Table 1).

As broadly recited in claim 12, a process for producing a landscape plan for a property comprises: defining a set of generic plant categories according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen (FIG. 1 – 110; page 5, line 16 – page 6, line 20); assigning a symbol to each generic plant category (FIG. 1 – 120; see FIG. 4; page 6, line 21 – page 7, line 11); and producing the landscape plan by indicating via the symbols locations for plants on the property (FIG. 1 - 150; see FIG. 3; page 10, line 18

— page 11, line 9), wherein the set of generic plant categories is divided into a first subset of generic plant categories corresponding to deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants (page 6, lines 1 and 17-19).

As broadly recited in claim 13, the unique symbols identify the deciduous plants and the evergreen plants (page 7, lines 7-9).

As broadly recited in claim 14, the process further comprises assigning a second set of unique symbols each corresponding to a type of hardscape material (FIG. 1 – 130; page 7, lines 12-17), wherein the landscape plan uses the second set of unique symbols to indicate hardscape materials to be used for hardscape elements indicated on the landscape plan (see FIG. 3; page 11, lines 5-9).

As broadly recited in claim 15, the landscape plan includes a legend identifying each symbol (page 11, lines 10-14; see FIG. 4).

As broadly recited in claim 16, the process further comprises providing a list of specific plants belonging to each generic plant category (page 11, line 18 – page 12, line 7).

As broadly recited in claim 18, a process for producing a landscape plan for a property comprises: defining a set of symbols, each symbol corresponding to a generic landscape element (FIG. 1 – 120, 130; see FIG. 4; page 8, lines 1-7); determining locations for specific landscape elements to be placed on the property with reference to at least one image of the property and a survey of the property; and producing the landscape plan by indicating via the symbols locations for the generic landscape elements on the property (FIG. 1 – 150; page 10, line 18 – page 11, line 2), wherein the set of symbols includes a first subset of symbols corresponding to a set of generic plant categories, and a second subset of symbols corresponding to a type of hardscape material (see FIG. 4; page 6, lines 21- page 7, line 19; page 11, lines 2-9).

As broadly recited in claim 19, the generic plant categories are defined according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen (page 5, line 16 – page 6, line 1).

As broadly recited in claim 20, the set of generic plant categories is defined according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen (page 5, line 16 – page 6, line 1).

As broadly recited in claim 21, the process further includes determining the locations for the plants to be placed on the property in accordance with a list of desired landscape characteristics for the property provided by an owner of the property (FIG. 1 – 140; page 9, lines 7-14).

Grounds of Rejection to be Reviewed on Appeal

The Grounds of Rejection to be reviewed on Appeal are:

(1) The rejections of claims 9-11 and 15-16 and 21 under 35 U.S.C. § 103 over Mykrantz U.S. Patent 5,246,253 ("Mykrantz") in view of Lanckton et al. U.S. Patent 6,617,419 ("Lanckton");

(2) The rejections of claims 12 and 13 under 35 U.S.C. § 103 over Mykrantz in view of Cronquist "*An Integrated System of Flowering Plants*" ("Cronquist");

(3) The rejections of claims 14, 18 and 19 under 35 U.S.C. § 103 over Mykrantz in view of Brimberg U.S. Patent 4,652,239 ("Brimberg").

Arguments

Claims 9-11 and 15-16 and 21 Are Patentable Over Mykrantz & Lanckton

Claim 9

Among other things, the process of claim 9 includes determining locations for plants to be placed on a property with reference to least one image of the property and a survey of the property.

The Examiner admits that Mykrantz does not disclose or suggest any such features.

However, the Examiner cites Lanckton for supplying these missing features, and states that it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified Mykrantz' garden planning kit to include

such features.

Applicant respectfully disagrees.

First, Applicants respectfully submit that Lanckton does not teach the recited features.

Claim 9 recites determining locations for **plants to be placed** on a property with reference to least one image of the property and a survey of the property.

Lanckton does not teach determining locations for plants **to be placed** on a property.

Indeed, the Examiner does not even really ever bother to actually state that it does. Instead, the Examiner merely states that Lanckton teaches:

“a system for providing precise position data of terrain features quickly and for automatically imaging those features for engineering (e.g., civil engineering) purposes and remote sensing”

Of course, again, that is not what Applicants have claimed. In fact, it could hardly have less to do with what Applicants have claimed. There is absolutely nothing cited in the Office Action that discloses or suggests anything at all about determining any locations for plants to be placed on a property.

So no combination of Mykrantz & Lanckton could ever produce the method of claim 9.

Second, Applicants traverse the proposed combination of Mykrantz & Lanckton as not being based on any articulated rationale with any factual underpinnings, and in fact, making absolutely no sense whatsoever.

Mykrantz is directed to a garden planning kit consisting of a worksheet having a grid, a drawing template, overlays and adhesive decals.

Lanckton is directed to an advanced terrain mapping system including a dead-reckoning system consisting of mass attitude sensors, roll potentiometers, wheel encoders, cameras, GPS receivers, computer processors, feature extraction and recognition software, etc.

The Examiner apparently believes that one of ordinary skill in the art at the time of the invention would have sought to modify Mykrantz' garden planning kit *"to incorporate the teachings of Lanckton."*

Applicants hardly believe that this contention needs any more than a simple statement of traversal. The lack of sense of the Examiner's proposition should be apparent to the Board.

The examiner further goes on to postulate that the reason that this modification of Mykrantz' garden kit would have been obvious is to *"allow for a more accurate and realistic looking landscape plan to be generated via the use of data gathered from the actual landscaping site itself."*

Putting aside for now the prospect of hauling Lanckton's tractor-trailer through grandma's backyard garden to help her stick adhesive stickers on Mykrantz' worksheet, Applicants note that the Examiner fails to cite anything at all anywhere in the prior art that suggests the reason he offers for the proposed modification of Mykrantz. The Examiner offers not but conclusory statements without any factual or rational underpinnings.

Meanwhile, a rejection on obviousness grounds under 35 U.S.C. § 103 cannot be sustained by mere conclusory statements: instead there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. In re Kahn, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). See also KSR International Co. v. Teleflex Inc., 550 U.S. ___, 82 USPQ2d 1385, 1396 (2007) (quoting Federal Circuit statement with approval).

Therefore, Applicants respectfully submit that the proposed combination of references is improper

Accordingly, for at least these reasons, Applicant respectfully submits that claim 9 is patentable over the cited art, and respectfully requests that the Board overturn the rejection of claim 9.

Claims 10, 11, 15 and 16

Claims 10, 11, 15 and 16 all depend from claim 9 and are deemed patentable over the cited art for at least the reasons set forth above with respect to claim 9, and

for the following additional reasons.

Claim 16

Among other things, the process of claim 16 includes providing a list of specific plants belonging to each generic plant category.

Applicant respectfully submits that it is apparent that a sheet containing decals which have a color corresponding to a color of a particular type of plant represented cannot reasonably (or even unreasonably) be considered to “read on” a list of plants (e.g., “Oak, Maple, Poplar”) belonging to a specific category, and the undersigned attorney is extremely confident that the Board of Patent Appeals will have absolutely no problem understanding that fact.

Accordingly, for at least this additional reason, Applicant respectfully request that the rejection of claim 16 be withdrawn.

Claim 21

Among other things, the process of claim 21 includes determining the locations for the plants to be placed on the property in accordance with a list of desired landscape characteristics for the property provided by an owner of the property.

The Examiner takes “Official Notice” that “*the concept and advantages of allowing a given owner of a property to supply input for and design a landscape plan of said property are known and expected in the art*” and that it would have been obvious to “*allow an owner of a property to utilize the method taught by Mykrantz and Lanckton et al. to supply input for and design a landscape plan for their property, because it would allow said property owner to cut out the need for a “middle-man” and would allow said owner to maintain full control over how said landscape was developed.*”

Once again, Applicant submits that this makes no sense at all.

First, what does it means for a property owner “to supply input for and design a landscape plan?” Is the Examiner proposing that the owner “provide input” or that the property owner “design a landscape plan?” These are two different things!

As far as a property owner “providing input,” who does the Examiner believe

that the property owner would be providing this input to?? Mykrantz provides a garden planning kit for an owner to design his own garden. There is no “middle-man” in Mykrantz. There is only one man (or woman) – the person designing their garden. The Examiner is attempting to add a second person to Mykrantz process by having the owner “provide input.” Why? How is modifying Mykrantz so that a property owner “provides input” to someone going to produce a “*more efficient and cost effective process*” as alleged by the Examiner. Why would anyone modify Mykrantz’ process so that it would “determine the locations for the plants to be placed on the property in accordance with a list of desired landscape characteristics for the property provided by an owner of the property.”

As far as a property owner “designing [his/her own] landscape plan” – that is not what claim 21 claims. Why and how would a property owner who is designing his own garden using Mykrantz’ garden planning kit “determine the locations for the plants to be placed on the property in accordance with a list of desired landscape characteristics for the property provided by an owner of the property?” That makes no sense. Furthermore, since Mykrantz is all about a garden planning kit for someone to design their own garden. So again, exactly what “middle-man” is supposedly being cut out by modifying Mykrantz to include this feature?

Finally, even if the proposed modification of Mykrantz made any sense at all, the Examiner once again fails to provide a proper foundation for his proposed reason for the modification. The examiner offers nothing but conclusory statements of alleged benefits and advantages without any evidence thereof, or that such alleged benefits and advantages would have been known or recognized by one of ordinary skill in the art at the time the invention was made.

Accordingly, for at least this additional reason, Applicant respectfully request that the rejection of claim 21 be withdrawn.

Claims 12 and 13 Are Patentable Over Mykrantz & Cronquist

Among other things, in the processes of claims 12 and 13, a set of generic plant categories is divided into a first subset of generic plant categories corresponding to

deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants.

The Examiner admits that Mykrantz does not disclose or suggest any such features.

However, the Examiner cites Cronquist for supplying these missing features, and states that it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified Mykrantz' garden planning kit to include such features.

Applicant respectfully disagrees.

Cronquist merely teaches that plants can be classified as deciduous or evergreen.

Applicants concede that it is known that plants can be classified as deciduous or evergreen. The examiner hardly needs to cite Cronquist for that knowledge it is commonly taught to grade school students.

Applicants have not claimed to have discovered this.

Instead, Applicants have claimed a specific process of producing a landscape plan by defining a set of generic plant categories according to at least one a variety of characteristics and dividing the generic plant categories into a first subset of generic plant categories corresponding to deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants.

As noted above, Mykrantz does not disclose dividing generic plant categories into a first subset of generic plant categories corresponding to deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants.

The Examiner states that it would have been obvious to have modified Mykrantz to include these features "*to provide an easier to understand classification of plants that either lose or maintain their leaves seasonally.*" That is tautological – in effect arguing that it would have been obvious to have modified Mykrantz to include the recited features . . . so that Mykrantz would include the recited features! This cannot possibly meet the standard of analysis for a rejection under 35 U.S.C. § 103 required by KSR cited above.

The Examiner also states that this would provide a user of Mykrantz system *“with more options which would allow them to plan out a landscape design with a greater degree of detail and accuracy.”*

Again, the Examiner offers conclusory statements which cannot support a rejection under 35 U.S.C. § 103.

Accordingly, for at least these reasons, Applicant respectfully submits that claims 12 and 13 are patentable over the cited art, and respectfully requests that the Board overturn the rejection of claims 12 and 13.

Claims 14, 18 and 19 Are Patentable Over Mykrantz, Lanckton & Brimberg

Claim 14

Claim 14 depends from claim 9. Applicant respectfully submits that Brimberg does not remedy the shortcoming of Mykrantz and Lanckton as set forth above with respect to claim 9, and accordingly, claim 14 is deemed patentable for at least the reasons set forth above with respect to claim 9.

Claim 18

Among other things, the process of claim 18 includes determining locations for specific landscape elements to be placed on a property with reference to least one image of the property and a survey of the property

For similar reasons to those set forth above with respect to claim 9, Applicant respectfully submits that the cited art does not disclose or suggest these features.

Accordingly, for at least these reasons, Applicant respectfully submits that claim 18 is patentable over the cited art.

Claim 19

Claim 19 depends from claim 18 and is deemed patentable over the cited art for at least the reasons set forth above with respect to claim 18.


CONCLUSION

In view of the foregoing explanations, Applicant respectfully requests that the Board reverse the rejections of claims 9-16, 18-19 and 21, and pass the application to

issue. If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 50-0238 for any additional fees required under 37 C.F.R. § 1.16, 37 C.F.R. § 1.17, and/or 37 C.F.R. § 41.20, particularly extension of time fees.

Respectfully submitted,
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Date: 26 September 2008

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Appendix - Claims on Appeal

1. (Withdrawn) A process for producing a landscape plan for a real property, comprising:
 defining a set of generic plant categories;
 assigning a corresponding unique symbol to each generic plant category,
 defining a set of unique symbols;
 communicating from a first party to a second party a survey of the real property, a photograph of the real property, and a list of desired landscape characteristics for the real property; and
 the second party generating the landscape plan for the real property, the landscape plan using the unique symbols to indicate locations on the real property where plants should be located.

2. (Withdrawn) The process of claim 1, wherein the generic plant categories are defined according to a plant size.

3. (Withdrawn) A process for producing a landscape plan for a property, comprising:
 defining a set of generic plant categories;
 assigning a corresponding unique symbol to each generic plant category,
 defining a set of unique symbols;
 receiving from a customer a survey of the property, a photograph of the property, and a list of desired landscape characteristics for the property; and
 generating the landscape plan for the property, the landscape plan using the unique symbols to indicate locations on the property where plants should be located,
 wherein the generic plant categories are defined according to a plant size and a leaf texture.

4. (Withdrawn) The process of claim 1, wherein the set of generic plant categories is divided into a first subset of generic plant categories corresponding to deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants.

5. (Withdrawn) The process of claim 4, wherein the unique symbols identify the deciduous plants and the evergreen plants.

6. (Withdrawn) The process of claim 1, further comprising assigning a second set of unique symbols each corresponding to a type of hardscape material, wherein the landscape plan uses the second set of unique symbols to indicate hardscape materials to be used for hardscape elements indicated on the landscape plan.

7. (Withdrawn) The process of claim 1, wherein the landscape plan includes a legend identifying each symbol.

8. (Withdrawn) The process of claim 1, further comprising providing a list of specific plants belonging to each generic plant category.

9. (Previously Presented) A process for producing a landscape plan for a property, comprising:

defining a set of generic plant categories according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen;

assigning a symbol to each generic plant category;

determining locations for plants to be placed on said property with reference to least one image of said property and a survey of said property; and

producing the landscape plan by indicating via said symbols locations for said plants on said property.

10. (Previously Presented) The process of claim 9, wherein the generic plant categories are defined according to at least one of a plant height and a plant width.

11. (Original) The process of claim 10, wherein the generic plant categories are defined according to a leaf texture.

12. (Previously Presented) A process for producing a landscape plan for a property, comprising:

defining a set of generic plant categories according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen;

assigning a symbol to each generic plant category; and

producing the landscape plan by indicating via said symbols locations for plants on said property,

wherein the set of generic plant categories is divided into a first subset of generic plant categories corresponding to deciduous plants, and a second subset of generic plant categories corresponding to evergreen plants.

13. (Original) The process of claim 12, wherein the unique symbols identify the deciduous plants and the evergreen plants.

14. (Original) The process of claim 9, further comprising assigning a second set of unique symbols each corresponding to a type of hardscape material, wherein the landscape plan uses the second set of unique symbols to indicate hardscape materials to be used for hardscape elements indicated on the landscape plan.

15. (Original) The process of claim 9, wherein the landscape plan includes a legend identifying each symbol.

16. (Original) The process of claim 9, further comprising providing a list of

specific plants belonging to each generic plant category.

17. (Canceled).

18. (Previously Presented) A process for producing a landscape plan for a property, comprising:

defining a set of symbols, each symbol corresponding to a generic landscape element;

determining locations for specific landscape elements to be placed on said property with reference to least one image of said property and a survey of said property; and

producing the landscape plan by indicating via said symbols locations for the specific landscape elements on said property,

wherein the set of symbols includes a first subset of symbols corresponding to a set of generic plant categories, and a second subset of symbols corresponding to a type of hardscape material.

19. (Previously Presented) The process of claim 18, wherein the generic plant categories are defined according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen.

20. (Withdrawn) The process of claim 1, wherein the set of generic plant categories is defined according to at least one of the following plant characteristics: plant height, plant diameter, leaf texture, and whether a plant is deciduous or evergreen.

21. (Previously Presented) The method of claim 9, further comprising determining the locations for said plants to be placed on said property in accordance with a list of desired landscape characteristics for the property provided by an owner

of the property.

Evidence Appendix

{None}

Related Proceedings Appendix

{None}